IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 13TH DECEMBER 2007 / 22ND AGRAHAYANA 1929

SA.No. 557 of 1994()

AS.55/1990 of SUB COURT, THIRUVALLA
OS.465/1984 of MUNSIFF'S COURT, THIRUVALLA.
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APPELLANT:1ST RESPONDENT:PLAINTIFF:

C.K.MATHAI,
CHACKUMVEIL HOUSE,
KURIANNOOR MURI,
THOTTAPUZHACHERRY VILLAGE. (D I E D)LRS IMPLEADED:

***ADDL.APPELLANTS 2 & 3 IMPLEADED:**

A2. MARIYAMMA, D/O.C.K. MATHAI,
AGED 52, RESIDING AT PATHAILPUTHENPURACKAL,
VEELLAYANIL P.O.

A3. KOSHI, S/O.C.K.MATHAI, AGED 48,
RESIDING AT CHAKKAMELLIL, KOLABHAGHAM P.O.,
KURIYANNUR VIA, THADIYAUR.

BY ADV. SRI.K.GOPALAKRISHNA KURUP
SRI.K.SURESH KURUP

RESPONDENTS: APPELLANT AND RESPONDENTS 2 AND 3:
DEFENDANTS 1 TO 3:
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1. JAYAMMA ABRAHAM,
SANTHOSH BHAVAN,
CHERUKARA PEEDIKAYIL,
VALIYAKUNNAM MURI, PERUMPATTY VILLAGE,
MALLAPALLY TALUK.

S.A.NO.557/1994

2. THOMAS CHACKO,
ATHAMPALIL HOUSE,
KOLAKOTTY, VALIYAKUNNAM MURI,
PERUMPATTY VILLAGE.

3. ABRAHAM MATHAI (D I E D)
PATHALIL PUTHENPURACKAL,
VALIYAKUNNAM MURI, PERUMPATTY VILLAGE.

*ADDL.RESPONDENTS 4 & 5 IMPLEADED:

R4. ANNAMMA NINAN,
17, ADEERWOOD DRIVE,
NEWCITY, NEWYORK 10956, U.S.A.

R5. ALEYAMMA THOMAS,
RAJIVE NAGAR L.5/56,
BLOCK NO.5 ROOM NO.56,
BAPUNAGAR – NEAR GENERAL HOSPITAL,
AHMEDBAD.

*LEGAL HEIRS OF THE DECEASED APPELLANT ARE IMPLEADED AS ADDITIONAL APPELLANTS 2 AND 3 AND ADDITIONAL RESPONDENTS 4 AND 5 IN THE APPEAL AS PER ORDER DTD. 15/09/1995 IN C.M.P.NO.1398/95.

BY ADV. SRI.K.P.VIJAYAN)
SRI.V.B.JINNAH)
SRI.BOBBY MATHEW) R1

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 13/12/2007 ALONG WITH SA NO. 576 OF 1994, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

KSS

M.SASIDHARAN NAMBIAR,J.

S.A.NO.557/94 & 576/94

Dated 14th December 2007

J U D G M E N T

Plaintiff in O.S.373/1983 on the file of Munsiff court, Thiruvalla is the appellant in S.A.576/1994. Plaintiff in O.S.465/1984 is the appellant in S.A.557/1994. Respective defendants in the respective suits are the respondents. Appellant in S.A.576/1994 is the third respondent in S.A.557/1994. O.S.373/1983 was instituted seeking a decree for permanent prohibitory injunction in respect of 51 cents in Survey No.127/1 and 128/1 of Perumpetty village of Mallappally Taluk. Plaint schedule property in O.S.465/1984 is 1 acre 1 and 1/8 cents in survey No.128/1-B1 and 165/1-A1 of the same village, which is described as remaining property of 1 acre 16 and 1/8 cents plot, excluding the property given to the Church. Appellant in S.A.576/1994 instituted O.S.373/1983 contending that 51 cents of plaint schedule property involved in that suit, originally belonged to Varghee Itty under registered mortgage

deed No.1657/1100 and the mortgage right was transferred in favour of Abraham and Aliyamma under Ext.B6 exchange deed dated 20/11/1958 and thereafter under Ext.B3 assignment deed it was purchased by the appellant in 1977 and respondents have no manner of right or possession over the same and they attempted to trespass into the property and therefore they are to be restrained by a permanent prohibitory injunction. Respondents resisted the suit contending that appellant has no right, title or possession to the property and Varghee Itty under whom the appellant claimed right had instituted O.S.116/1960 claiming right under the mortgage deed of 1100 M.E and under Ext.A2 judgment and Ext.A3 decree it was found that Varghee Itty did not obtain the property under the mortgage and therefore appellant cannot claim any right or title and the claim is barred by principles of res judicata. It was also contended that first respondent obtained right, title and possession under Ext.A1 assignment deed executed by fourth respondent and excluding the property given to the church the remaining property is in the possession of the appellant in S.A.557/1994. Said appellant instituted O.S.465/1984 seeking a decree for permanent prohibitory

injunction contending that he has title and possession to the property, under Ext.A1 sale deed executed by fourth defendant in that and defendants therein have no right or possession over the property. Fourth defendant died during the pendency of the suit. As he did not dispute the right of the plaintiff in O.S.465/1984 his legal heirs were not impleaded in the suit or subsequent appeals. Respondents 2 and 3 in S.A.576/1994 jointly filed written statement disputing the claim contending that portion of the property allegedly obtained by Abraham and Aliyamma under Ext.B6 is in their possession under Ext.A3 assignment deed and therefore plaintiff in O.S.373/1983 is not entitled to the decree sought for. Both suits were jointly tried. O.S.465/1984 was taken as the leading case and Pws.1 and 2 were examined and Ext.A1 to A5 and and Exts.C1 to C3 were marked on his side. Dws.1 to 7 were examined and Exts.B1 to B8 were marked on the side of plaintiff in O.S.373/1983. Learned Munsiff on the evidence found that plaintiff in O.S.373/1983 is claiming right and possession under Ext.B3, which in turn was the assignment of the right obtained under Ext.B6 from Varghee Itty and the right transferred under Ext.B6 is the right of the mortgagee

obtained by Varghee Itty under mortgage deed No.1657/1100. It was also found that plaintiff in O.S.465/1984 is claiming right, title and possession under Ext.A1 sale deed executed by fourth defendant. It was also found that Varghee Itty under whom plaintiff in O.S.373/1983 claims right and title had instituted O.S.116/1960 and under Ext.A2 judgment and Ext.A3 decree, it was found that he did not derive any right or title under mortgage deed No.1657/1100. Though learned Munsiff found that as Ext.B6 transfer was made prior to the institution of O.S.116/1960 and as plaintiff in O.S.373/1983 was not a party to O.S.116/1960 the subsequent suit is not barred by principles of res judicata it was found that finding in Ext.A2 judgment that Varghee Itty did not derive any right under mortgage of 1100 is binding on her as plaintiff in O.S.373/1983 is setting up right under said mortgage deed. Learned Munsiff also found that plaintiff in O.S.465/1984 obtained title to the property covered under Ext.A1 and it was correctly demarcated by the Commissioner in Ext.C2 plan and there was no dispute with regard to the identity of property, though eastern boundary does not tally with the boundary shown in Ext.A1. Learned Munsiff

also found that under Exts.B1 and B2 defendants 1 and 2 claimed right under fourth defendant and when under Ext.A1 fourth defendant had already alienated the property defendants 1 and 3 did not get right under Ext.B1 and B2 and found that plaintiff in O.S.465/1984 has title and possession to plaint schedule property therein. Therefore decree for injunction is granted in O.S.465/1984 and O.S.373/1983 was dismissed. Plaintiff in O.S.373/1983 challenged the said common judgment before Sub court, Thiruvalla in A.S.54/1990 and A.S.55/1990. Learned Sub Judge on re-appreciation of evidence confirmed the findings of learned Munsiff under Ext.A2 judgment it was found that Varghee Itty did not obtain the mortgage right. Learned Sub Judge also found that plaintiff in O.S.373/1983 is claiming right under Varghee Itty and so the claim is barred by principles of res judicata. It was therefore held that she is not entitled to decree in O.S.373/1983. But on appreciation of evidence learned Sub Judge further found that property covered under Ext.A1 was not properly identified and from the materials placed it is not possible to hold that the property covered under Ext.A1 is part of the property covered under Ext.A2 judgment, as the

eastern boundary does not tally. It was held that plaintiff in O.S.465/1984 is not entitled to the decree granted by trial court. A.S.54/1990 was dismissed confirming judgment in O.S.373/1983. A.S.55/1990 was allowed and judgment in O.S.465/1984 was set aside and suit was dismissed. Challenging the dismissal of O.S.465/1984 by allowing A.S.55/1990, plaintiff in O.S.465/1984 filed S.A.557/1994. Challenging dismissal of O.S.373/1983 as confirmed in A.S.54/1990, plaintiff therein filed S.A.576/1994. Both the appeals were admitted formulating the following substantial questions of law.

> 1) Whether first appellate court was justified in holding that plaint schedule property in O.S.465/1984 is not identifiable in the light of Ext.C1 report and C2 plan, for the sole reason that eastern boundary does not tally when all the other boundaries tally and there was no dispute with regard to the identity of the property before the trial court.
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> 2) Whether legal conclusion and inferences arrived at by first appellate court are based on proved facts and circumstances and if not, whether reversal of the decree granted

in O.S.465/1984 is sustainable.

3) Whether first appellate court was justified in holding that O.S.373/1983 is barred by res judicata, in view of Ext.A2 judgment when that suit was filed in 1960 and plaintiff in that suit transferred the property under Ext.B6 in 1958 and the assignors under Ext.B6 were not made parties to that suit.

4) Whether on the evidence courts below were justified in holding that plaintiff in O.S.373/1983 is not entitled to a decree for injunction.

Subsequent to the filing of appeal appellant in S.A.557/1994 died and legal heirs were impleaded as additional appellants 2 and 3 and respondents 4 and 6. So also respondents 2 and 3 in S.A.576/1994 died subsequent to the filing of the appeal and their legal heirs impleaded as respondents 4 to 15.

2. Learned counsel appearing for appellants and respondents were heard.

3. Appellant in S.A.576/1994 instituted O.S.373/1983 claiming a decree for injunction contending that she is in possession of the property under Ext.B3 assignment deed and respondents have no right over that

property. Right obtained under Ext.B3 is the right obtained by her assignors, Abraham and his wife Aliyamma who in turn obtained the right under Ext.B6 exchange deed executed by Varghee Itty on 20/11/1958. It is admitted case that the said Varghee Itty instituted O.S.116/1960 claiming right and possession under the mortgage deed No.1657/1100 M.E against fourth defendant in O.S.465/1984, who is none other than the assignor of the appellant in S.A.557/1994 under Ext.A1. Under Ext.A2 judgment, it was found that Varghee Itty did not obtain the mortgage right as claimed under mortgage deed No.1657/1100. Ext.A2 judgment establish that the mortgage right claimed by Varghee Itty was from Marangadu family and the property belonged to Valiyedathu family. Under Ext.A2 it was found that only Valiyedathu family had right over the said property and Varghee Itty did not derive any right in the property under the mortgage deed executed by Marangadu family. Even if argument of learned counsel appearing for appellant that as O.S.116/1960 was instituted after Ext.B6 and Abraham and Aliyamma the assignors under Ext.B6 were not made parties in O.S.116/1960 are accepted and it is to be found that Ext.A2 judgment will not

operate as bar of res judicata, when the appellant in S.A.576/1994 is claiming right, title and possession only under the said Varghee Itty she is not entitled to ignore the finding against Varghee Itty. Unless it is established in the suit that the mortgagor Marangadu family under whom Varghee Itty claimed mortgage right had right, appellant in S.A.576/1994 cannot succeed in the suit. There is absolutely no evidence to prove that the said mortgagor family has any right in the property. On the evidence courts below rightly found that under Exts.B6 and B3 appellant in S.A.576/1994 is not entitled to claim any right. Therefore, dismissal of O.S.373/1983 is perfectly correct and the concurrent judgment in O.S.373/1983 as confirmed in A.S.54/1994 warrants no interference.

4. Trial court on the evidence found that appellant in S.A.557/1994 has title to the property covered under Ext.A1. Learned Sub Judge in the first appeal also did not interfere with the finding based on Ext.A1. Judgment of the trial court was interfered for the sole reason that identity of the property was not established. As rightly argued by learned counsel appearing for appellant in S.A.557/1994, Ext.C1 report

and C2 plan establish that property demarcated therein is the property obtained by the appellant in S.A.557/1994 under Ext.A1 sale deed. Trial court specifically found that identity of the property covered under Ext.A1 as marked by the Commissioner in Ext.C2 plan, was not objected to. Though eastern boundary shown in Ext.A1 does not tally with the property demarcated by the Commissioner, trial court accepted the identity finding that eastern boundary referred as road is far away on the east and nobody has a case that property covered under Ext.A1 is touching the eastern road. Learned Munsiff also found that all other boundaries tally. On going through the records of courts below it is seen that, even though Commissioner in Ext.C1 report and Ext.C2 plan demarcated the property covered under Ext.A1, correctness of the demarcation or the identification was not challenged. No evidence was also adduced with regard to the identity of the property. Therefore first appellate court was not at all justified in finding that property marked as plaint schedule property in Ext.C2 plan is not the plaint schedule property in O.S.465/1984 or the property obtained by appellant in S.A.557/1994 under Ext.A1. As rightly found

by courts below, when under Ext.A1 fourth defendant assigned right in favour of appellant in S.A.557/1994, respondents 1 and 2 cannot claim any right under Exts.B1 and B2 which came into existence later. When fourth defendant already alienated the property he has no further right. In such circumstances, no interference is warranted against decree granted by trial court in O.S.465/1984 also and the judgment in A.S.55/1990 is not sustainable. S.A.576/1994 is dismissed confirming the concurrent judgment in O.S.373/1983. S.A.557/1994 is allowed. Judgment in A.S.55/1990 is set aside. Judgment in O.S.465/1984 on the file of Munsiff court, Thiruvalla is restored. Parties are directed to bear their respective cost in their appeals.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO.557/94 & 576/94

14th December 2007

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